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No.

In the Supreme Court of the United States

OCTOBER TERM, 1966

UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, CARPENTERS DISTRICT COUNCIL OF DENVER AND VICINITY, AFL-CIO, PETITIONER,

v.

HENSEL PHELPS CONSTRUCTION COMPANY, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner above named prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals and the order modifying said opinion upon petition for rehearing are reported at 376 F. (2d) 731 and are attached hereto as Appendix A (pp. 15-26, *infra*). The opinion of the district court for the District of Colorado (R. 15-21) is unreported.

JURISDICTION

A judgment of the court of appeals was entered on February 6, 1967 (R. 5). This petitioner filed a petition for rehearing in the court of appeals on February 24, 1967 (R. 6). The court of appeals denied said petition but modified its opinion and judgment on June 7, 1967 (R. 7). A copy of the court's judgment, as modified, is set forth in the appendix (App. B, p. 27, *infra*). The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Does the judgment deny to employees the right to engage in concerted activities for mutual aid or protection, and the right to strike, guaranteed and assured by Sections 7 and 13 of the National Labor Relations Act (29 U.S.C. 157, 163)?

2. Where a collective bargaining agreement does not contain any provision for final and binding arbitration, or any "no-strike" clause, can a strike for wages claimed under the agreement give rise to any claim for damages under Section 301(a) of the Labor Management Relations Act (29 U.S.C. 185(a))?

3. Has the court of appeals so far departed from the accepted and usual course of judicial proceedings (by predicating an award of damages upon an entirely different contract from the one upon which suit was brought) as to call for an exercise of this court's power of supervision?

STATUTES INVOLVED

National Labor Relations Act:

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)." (61 Stat. 140, 29 U.S.C. 157).

"Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." (61 Stat. 151, 29 U.S.C. 163).

Labor Management Relations Act:

"Sec. 301.(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." (61 Stat. 156, 29 U.S.C. 185(a)).

STATEMENT

In June of 1964, the employer, Phelps, was awarded a contract by the City and County of Denver covering the construction of an elevated drive and new terminal building at Stapleton Air Field in Denver (R. 244). At that time there was in effect a "building construction agreement" between the defendant District Council and Associated Building Contractors of Colorado, Inc., of which Phelps was a member (Ex. 1, R. 201). This agreement covered the employment of carpenters in the building construction industry in Denver, and Phelps, as a member of the Association, was entitled to the benefits of the agreement (R. 57). The agreement contained a rudimentary "open-end" disputes procedure and did not contain any provision for final and binding arbitration of disputes, or any "no-strike" clause (Ex. 1, Art. VIII, R. 213).

The union had a separate form of agreement for highway and heavy construction, which provided generally lower wage rates than those in the building construction agreement (Ex. 2, R. 215). Phelps had no signed highway and heavy construction agreement with the union (R. 65), but the building construction agreement provided that the highway and heavy agreement should be available to any Association member who desired to engage in highway and heavy construction work (R. 202-d).

Shortly after Phelps commenced work at the airport under the contract a dispute arose between Phelps and the union over the question whether construction of the elevated drive was building construction work or highway and heavy work (R. 28, 62). The union followed the disputes procedure of the building construction agreement (R. 37), the final step of which was presentation of the

dispute to a joint meeting of the negotiating committee of the union and the bargaining committee of the Association. The two committees deadlocked and could not resolve the dispute (R. 38).

Thereafter the union notified Phelps that no carpenters would be furnished for the airport job unless all of the men were paid the higher wage rate provided in the building construction agreement (R. 29). Phelps refused to meet this demand and the union then caused a work stoppage on the job (R. 47). Within a few days Phelps agreed to pay the wage rates provided in the building construction agreement reserving, however, all of his rights (R. 241). The union carpenters then returned to the job and were paid the building construction rates thereafter (R. 67).

Suit was brought under, and federal court jurisdiction was predicated upon, Section 301(a) of the Labor Management Relations Act (29 U.S.C. 185(a)). The claim was for damages for breach of the highway and heavy agreement, between the respondent and the petitioner (par. 10, R. 5). The defenses were a denial that the highway and heavy agreement was ever made between the parties, and a defense that the only contract between the parties, the building construction agreement, contained a disputes procedure which the union followed in every respect, and thereafter the union was entitled, under Section 7 of the National Labor Relations Act (29 U.S.C. 157), to exert economic pressure against the employer in furtherance of its demands (R. 9).

The breach of contract sued upon in the amended complaint was the failure "to furnish employees designated as carpenters for heavy and highway work under

the provisions of Exhibit 'B' " (par. 10, R. 5 — the highway and heavy agreement). The pre-trial order specified that the "contract" sued upon was the highway and heavy agreement (par. 5 and Issues of Fact, a) and b), par. 6, R. 10-11). The case was tried upon the theory that the union was obligated by and had breached the highway and heavy agreement. The district court found that the highway and heavy agreement (Exhibit 2) was in full force and effect between the parties and had been violated by the union, for which the union was assessed damages of $8,000 (R. 19-20).

The court of appeals, however, held that the highway and heavy agreement never came into effect between the parties (App. A, p. 22) and that upon completion of the disputes procedure in the building construction agreement, the union was free to pursue the remedy of causing a work stoppage (App. A, p. 23); nevertheless, the court of appeals held that this work stoppage violated the building construction agreement (App. A, p. 25) and affirmed the judgment of the district court against the defendant district council.

REASONS FOR GRANTING THE WRIT

1. The court of appeals has erroneously decided an important federal question which has not been, but should be, specifically settled by this court.

The important federal question involved may be stated as follows:

> In a dispute over the applicable wage scale provided by a collective bargaining agreement, where the agreement contains an open-end procedure for ad-

justing disputes without any no-strike clause, may the union be held liable in damages under Section 301(a) of the Labor Management Relations Act for causing a work stoppage after the union has exhausted the disputes procedure without resolving the dispute?

The decision of the court of appeals answers this question in the affirmative. The court agreed that the union had complied with the disputes procedure of the contract and held that, upon such compliance, the contract "permits the parties to resort to other remedies such as work stoppages, lockouts, or the courts." (App. A, p. 23). Thus, the court regarded the right to strike as a remedy on a parity with access to court, instead of a substantive right of great importance in the continuing process of collective bargaining. The opinion says, in effect, that the union had a right to strike, but the union may be held in damages for exercising its right.

Under such an analysis of the remedies available to each party, the full extent of the employer's remedy would be a declaratory judgment and the court should have so held. The damage award nullifies and makes a mockery of the union's right to strike and, as a practical matter, places the union under a "no-strike" burden which cannot be found in the contract.

Such a view might be justified in the case of a frivolous or groundless claim by the union, but that is not this case, for the elevated drive here involved is simply an extension of a building entrance, an integral part of a building, resting upon the building foundations, supported in part by its lateral beams, and serving as part of its roof (R. 97-102, 108-109).

It is significant, too, that the final step in the disputes procedure of the subject contract is that the matter is referred to the *negotiating committees* of the employer and the union (R. 213-214), a clear recognition by the parties that a dispute over the proper interpretation of the agreement would be subject, in the final step, to a renewal of collective bargaining.

The importance of the federal question presented lies both in the nature of the right to be protected, and in the extent to which collective bargaining agreements prevailing in industries affecting commerce allow for and contemplate the exercise of this right during the term of such agreements.

The right to strike is labor's ultimate economic weapon. Unless that right is safeguarded and protected from both obvious and subtle erosions, the process of collective bargaining is hopelessly one-sided. For this reason, Congress was very explicit, in Sections 7 and 13 of the National Labor Relations Act, to protect the right of employees to engage in concerted activities for mutual aid or protection, and the right to strike, and these rights form one of the cornerstones of federal labor law.[1]

With respect to the prevalence of contract provisions enabling strike action during the contract term, the Department of Labor found, in a study of 1717 major collective bargaining agreements, each covering 1,000 workers or more, that 88 of the agreements, covering 215,000 workers, contained an open-end grievance procedure and stated as to such procedure:

> "It is important to note that, at the exhaustion of the grievance machinery, the employer's action pre-

[1] NLRB v. Lion Oil Co., 352 U. S. 282, 77 S.Ct. 330, 1 L.Ed. 2d 331 (1957).

vails (i.e., the grievance is denied) unless another recourse is available to the union." (*Major Collective Bargaining Agreements — Grievance Procedures*, U.S. Dept. of Labor, Bur. Labor Stats., Bull. No. 1425-1, Nov. 1964, pp. 3, 56).

In addition, however, 285 of the contracts "limited the disputes that were subject to arbitration, thereby presumably limiting the strike prohibition." ("*Major Collective Bargaining Agreements — Arbitration Procedures*", U.S. Dept. of Labor, Bur. Labor Stats., Bull. No. 1425-6, June, 1966, pp. 83, 87).

It is clear, therefore, that a large number of collective bargaining agreements, covering many thousands of workers, rest in some degree upon preservation of the right to strike during the contract term. Even in very sophisticated and highly detailed collective bargaining agreements, the parties often withhold certain specified subjects from arbitration provisions, and thereby reserve to the union the option of work stoppages over such matters during the term of the collective bargaining agreement. For example, the highly detailed 1964 agreement between General Motors and the United Automobile Workers effective until September 6, 1967, withholds certain subjects from the final arbiter, the "Umpire", and contains a no-strike clause as to matters so withheld merely limiting the union not to strike until a short waiting period has expired (CCH, *Labor Law Reporter*, "Union Contracts Arbitration," pp. 85039, 85061). Similarly, the National Master Freight agreement of the Teamsters preserves to each party "all lawful economic recourse to support its position" if the National Grievance Committee, composed of an equal number of employer and union representatives, deadlocks on the disposition of a dispute (Ibid., p. 86913).

The question presented by this case is, therefore, a question of vital substantive right common to numerous and varied collective bargaining situations in industries affecting commerce.

2. The decision of the court of appeals conflicts, in principle, with applicable decisions of this court on the federal question involved.

The Supreme Court has repeatedly recognized and protected the right to strike during the term of a collective bargaining agreement where the parties have failed to provide for final arbitration or settlement of disputes, and have omitted a no-strike clause from their agreement. In *NLRB v. Lion Oil Co.*, 352 U.S. 282, 77 S.Ct. 330, 1 L.Ed. 2d 331 (1957), the court recognized the importance of the right to strike as labor's most effective economic weapon in improving wages and working conditions and upheld the union in calling a strike during a 60-day period in which either party might terminate the agreement upon notice. The court pointed out that:

> "Unions would be wary of entering into long-term contracts with machinery for reopening them for modification from time to time, if they thought the right to strike would be denied them for the entire term of such a contract, though they imposed no such limitations on themselves." (352 U.S. 289).

The court further said:

> "Where there has been no express waiver of the right to strike, a waiver of the right during such a period is not to be inferred." (352 U.S. 293).

In *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 82 S.Ct. 571, 7 L.Ed. 2d 593 (1962), this court held

that a contract provision for compulsory binding arbitration obligated the union not to strike, but specifically rejected the notion "that a strike during the term of a collective bargaining agreement is *ipso facto* a violation of the agreement." (369 U.S. 105, fn. 14).

The court further said:

> "What has been said is not to suggest that a no-strike agreement is to be implied beyond the area which it has been agreed will be exclusively covered by compulsory terminal arbitration." (369 U.S. 106).

The court has recognized that some collective bargaining agreements leave open considerable areas for later negotiation or self-help by the parties. In *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed 2d 1409 (1960), the court observed:

> "A collective bargaining agreement may treat only with certain specific practices, leaving the rest to management but subject to the possibility of work stoppages." (363 U.S. 583, and see fn. 5, 363 U.S. 579).

The decision of the court of appeals cannot be reconciled in principle with the foregoing decisions and statements of this court.

3. The decision of the court of appeals also conflicts in principle with its own prior decisions, and with decisions of the Court of Appeals for the District of Columbia on the federal question involved. In *Western Contracting Corp. v. NLRB*, (10th Cir. 1963), 322 F.2d 898, the court held that a strike ratified by the union during the term of a collective agreement was a lawful exercise of the right to strike preserved by Section 7 of the Act. The contract

did not contain a no-strike clause, and the strike occurred when the workmen refused to operate trucks furnished by the employer without heaters, notwithstanding a contract clause which prohibited the union from refusing to operate or otherwise hamper the use of any equipment intended to increase the efficiency of the employer's operations.

The cases in the District of Columbia Court of Appeals involved various aspects of a United Mineworkers contract containing detailed disputes procedures and a provision that "national" disputes should be settled by free collective bargaining. In *International Union, United Mineworkers v. NLRB,* (C.A. D.C. 1958) 257 F.2d 211, the National Labor Relations Board had held that the grievance procedures of the contract excluded the right to strike but the court of appeals set aside the Board's order, observing that Section 13 of the National Labor Relations Act "is an admonition to deciding tribunals not to interpret ambiguous provisions of contracts as amounting to 'no-strike' agreements." (257 F.2d 218).

Later, the case of *Mile Branch Coal Co. v. United Mineworkers* came before the court of appeals for the District of Columbia (286 F.2d 822 (1961)). This was a suit for damages for violation of the same collective bargaining contract involved in the case just discussed. The court granted the union's motion for summary judgment on the authority of *International Union, UMW v. NLRB, supra,* and in *Mile Branch Coal Company v. United Mineworkers,* 365 U.S. 871, 81 S.Ct. 905, 5 L.Ed. 2d 861 (1961), this court denied certiorari.[2]

[2]The Sixth Circuit, in United Mineworkers v. Benedict Coal Corp. (6th Cir. 1958), 259 F.2d 346, had reached a contrary result on the same contract, holding that the contract included a no-strike obligation even though the parties had expressly bargained such a clause out of the contract. When this case was appealed to the Supreme Court, the court was equally divided, resulting in affirmance by operation of law. (United Mineworkers v. Benedict Coal Corporation (1960), 361 U.S. 459, 464, 80 S.Ct. 489, 4 L.Ed. 2d 442).

The court of appeals decisions hereinabove cited disclose conflict and confusion in judicial approach to work stoppages under collective bargaining agreements which omit both a no-strike provision, and a provision for final compulsory arbitration.

4. As a final ground for granting the petition herein, it is respectfully submitted that the decision of the court of appeals departs from the accepted and usual course of judicial proceedings by awarding judgment upon a certain express contract in a suit predicated throughout upon violation of a separate and entirely distinct express contract. In the amended complaint and in the pre-trial order plaintiff stated its claim solely in terms of a breach of the highway and heavy agreement. The pre-trial order stated the contested issues, as to the contract sued upon, solely in terms of a violation of the highway and heavy agreement, and the case was tried upon this theory. The court of appeals therefore, has gone outside the issues framed by the pleadings and the pre-trial order, and litigated at the trial, to hold that the contract sued upon under Section 301, aforesaid, was the building construction agreement instead of the highway and heavy agreement.

The conclusion of the court that the highway and heavy agreement, upon which plaintiff's claim for damages was predicated, "never came into existence" (App. A, p. 22), eliminated the basis of plaintiff's claim.

Plaintiff may have a claim that its damages resulted from a breach of the Building Construction Agreement (which petitioner does not, of course, concede). The six-year state statute of limitations (Colo. Rev. Stat., 1963, 87-1-11), applicable to this Section 301 case, has not by any

means expired. If plaintiff has such a case, it is assuredly not the case upon which plaintiff sued here.

Where a plaintiff sues upon an express contract, he must recover upon that contract or not at all.

Lientz v. Wheeler (8th Cir. 1940), 113 F.2d 767.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

[Caption Omitted]

Before BREITENSTEIN and SETH, Circuit Judges, and KERR, District Judge.

OPINION OF THE COURT OF APPEALS
(Filed February 6, 1967)

By SETH, Circuit Judge.

The appellee, Hensel Phelps Construction Company, brought this action under § 301 of the Labor Management Relations Act of 1947, 29 U.S.C.A. § 185, for damages for breach of collective bargaining agreements. The defendant-appellants are labor organizations and individuals representing a single union which was a party to the agreements. The action was tried to the court, and judgment was rendered against the appellant-union in the amount of $8,000.00. The union took this appeal.

The disagreement arose between the parties over the question whether certain work done by appellee's carpenter employees on an elevated ramp for automobiles to reach the entrance to the Denver airport was to be paid at the rate for building work or highway work. The issue raised the question as to which of two collective bargaining agreements would be applicable to this type of work, both agreements being between the same parties. The amount of the judgment appealed from represents the difference between the two wage scales.

The trial court concluded that the union had breached its highway collective bargaining agreement with appellee Phelps by causing a work stoppage without first complying with the disputes procedure of such agreement.

The facts, about which there is no dispute, may be summarized as follows:

Appellee Phelps had been awarded a contract by the City and County of Denver, Colorado, to construct an air terminal building and an elevated drive at Stapleton Airfield in Denver.[1] Phelps was a member of the Associated Building Contractors of Colorado, Inc., hereinafter "ABC." ABC, representing its members, had negotiated a master collective bargaining contract with the appellant union, which contract is captioned "Building Construction Agreement Carpenters," and to which we will refer as the "building contract." Article I, section 4, of the building contract describes in detail the carpenter work within the coverage of the contract. However, Article I, section 2(d), of the building contract states that work covered by the "Housing Agreement and The Heavy and Highway Agreement" shall not be considered similar to work within the coverage of the building contract for purposes of automatically granting a lower wage scale to any employer under the building contract when another employer has secured a lower wage scale than that provided by the contract.

Section 2(d) of the building contract further states that a Heavy and Highway Agreement "shall be available to any member of the Employer [any member of ABC], who desires to engage in such work, for signature with the Union."

The Heavy and Highway Agreement, which we will refer to as the "highway contract," is the second of two collective bargaining contracts involved in this appeal.

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[1]The letter awarding the contract to Phelps and the plans and specifications of the project refer to "Schedule Two Elevated Drive" and "Schedule Three Terminal Building."

The building contract describes work within its jurisdiction in terms of the particular job the employee might perform, e.g., "making and setting of concrete forms," "fitting and hanging of all doors," "making and installing of all acoustic properties." The highway contract describes work within its jurisdiction by the nature of the construction project, e.g., "all work performed in the construction of streets and highways, airports, utilities, levee work," etc.[2] The important fact giving rise to the dispute and leading to this appeal is that the wage scale for carpenters provided in the highway contract is less than the wage scale provided in the building contract.

Although there is no dispute that a substantial part of the entire construction project was within the jurisdiction of the building contract (the terminal buildings), classification of the elevated drive leading to the building entrance as highway work or building work immediately became a source of disagreement between the parties. There is conflicting evidence relating to the understanding of the parties as work commenced; however, for the first four or five weekly pay periods Phelps paid employees working on the elevated drive the lower wage scale provided in the highway contract. After a number of informal discussions, the dispute between Phelps and the union representatives concerning the classification of the elevated drive and applicable wage scales reached a critical point in the week of July 24, 1964.

On July 23 Phelps mailed to the union a Heavy and Highway Agreement for union signature, as provided in

[2]The highway contract defines building construction as "building structures, including modifications thereto or additions or repairs thereto, intended for use as shelter protection, comfort or convenience . . . No structures such as . . . bridges . . . , forming a part of a highway, which are required under the provision of a highway construction contract, shall be regarded as constituting building work."

section 2(d) of the building contract. The union received the agreement on July 24, but did not sign it. On July 24 a formal meeting was convened between the union representatives and representatives of ABC, the contractors' association, pursuant to Article VIII, section 1, of the building contract, which provides: "The said committees are charged with the responsibility of reaching a settlement by mediation, conciliation or arbitration as the circumstances require; the decision so reached shall be put in writing and shall be binding on all parties to the controversy." The foregoing excerpt is the extent of the procedure for resolving disputes under the building contract. A vote taken at the meeting resulted in a deadlock. The union considered the building wage scale applicable to the elevated drive, and the contractors considered the highway wage scale applicable.

After the meeting was adjourned on July 24, the union advised Phelps that unless Phelps agreed to pay building wages on the elevated drive, the union would inform its members that they were receiving substandard wages. It was understood that such advice would result in a walkout or work stoppage. Phelps would not agree to pay building wages, but did offer to place the amount represented by the difference between highway and building wages in escrow pending a final determination of the issue. The union declined this offer, and advised its members that Phelps was paying substandard wages, and the carpenters walked out. Work was resumed in two days, after Phelps agreed to pay building wages, but reserved all rights under the building contract pending a final determination of the issue.[3]

[3]It also appears that Phelps made retroactive payments for the first four or five weekly pay periods for which the highway scale had been paid.

Phelps thereafter brought this suit against the union for breach of contract, seeking recovery of the difference between highway and building wages paid, and other damages.

The trial court found that the building contract meeting of July 24, which resulted in a deadlock, had exhausted the dispute procedure set forth in such contract. The trial court found that the ramp construction was highway work, and that the highway contract was operative. It also found that the dispute procedure set forth in the highway contract was different from that established in the building contract, and that the union had not complied with its contract dispute procedure before causing a work stoppage.[4]

From the foregoing findings, the trial court concluded that the parties were bound by the provisions of both the building and highway contracts, and that the dispute concerned the application of the highway contract to the elevated drive. Thus the union was required to comply with the dispute procedure of both the highway contract and the building contract. The court concluded that the union had failed to comply with the dispute procedure of the highway contract; that the highway contract was breached by the work stoppage, and Phelps was entitled to recover damages in the amount of the building wage scale paid for highway work.

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[4]The highway contract sets forth its dispute procedure in some detail, but representatives for the union and the contractors, for purposes of a meeting to resolve a dispute, are different than those designated by the building contract. Article VII of the highway contract provides: "If the Joint Committee is unable or unwilling to render a decision because of deadlock vote or otherwise, thereafter the Employer and the Union shall be free to pursue whatever other legal rights and remedies they may have." The highway contract expressly prohibits work stoppage by either side until the joint committee has, or has not, reached a decision, but neither party is bound to abide the decision of the joint committee.

This appeal is under the provisions of § 301 of the Labor Management Relations Act, 29 U.S.C.A. § 185, and federal substantive law applies. Republic Steel Corp. v. Maddox, 379 U.S. 650; John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543. Although we have been referred to no case concerned with issues quite like those presented in the case at bar, the Supreme Court has established a broad policy for judicial interpretation of collective bargaining contracts. The Court has stated: "[W]e think special heed should be given to the context in which collective bargaining agreements are negotiated and the purpose which they are intended to serve." United Steelworkers v. American Manufacturing Co., 363 U.S. 564. "The collective agreement covers the whole employment relationship. It calls into being a new common law . . . ." United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574. The Court has also held that in the context of collective bargaining contracts, preoccupation with the doctrines of ordinary contract law may thwart realization of congressional policy. *Cf.* United Steelworkers v. American Manufacturing Co., supra.

These policies are of course difficult to apply to a particular factual situation such as we have before us. We can examine however the purpose for which the agreements were intended to serve, the fact that they are intended to cover as great a portion of the parties' relationships as possible, and that all the doctrines of contract law may not be applicable.

This dispute originated during the course of work under a particular agreement, the building contract, and all negotiations and procedures were initially taken pursuant to it. The employees' pay was initially made at a different scale, but with no indication that a different

agreement would be invoked in its entirety. The dispute was treated by the parties as one over an applicable pay scale under a single contract, and the court should treat it in the same way. There was no disagreement as to the hourly rate if the nature of the work was decided. Thus again it was treated by all concerned as a dispute over which of two wage scales should apply.

We hold that the judgment of the trial court must be affirmed, but we cannot agree with the trial court's conclusion of law that the parties were bound to comply with the dispute procedures of both the building contract and the highway contract.

As indicated above, the disagreement between the parties centered about one issue. Was the elevated drive building work, or was it highway work? The contents of the contracts in question cannot be considered separately from the unusual nature of the dispute in the case at bar. Unlike the facts of most cases to which we have been referred, the dispute here is fundamental, for it questions which of two contracts should apply to the elevated drive. Until the underlying question of fact was determined, that is, classification of the elevated drive as building or highway work, the parties could not know which wage scale to use. Although the trial court concluded that the dispute concerned application of the highway contract to the elevated drive, the dispute was concerned equally with application of the building contract to the elevated drive.

Review of the record satisfies us that the parties regarded the dispute as one arising under the building contract. It appears that work on the airport project was commenced under the building contract, though the parties never agreed on the classification of the elevated drive.

A substantial part of the airport project was within the jurisdiction of the building contract, and the building contract, in Article I, section 2(d), provides that a highway contract, for signature with the union, shall be available to any contractor desiring to engage in highway work. The meeting of July 24 was convened pursuant to the dispute procedure established in the building contract, and Phelps sought to invoke the highway contract in the manner provided in the building contract.

When Phelps sought to put into effect the highway contract under section 2(d) of the building contract, the dispute had long before focused on the classification of the elevated drive. It could not invoke the highway contract for building work, and thus the "jurisdictional" question still remained as before. Phelps' action in executing the highway contract was no more than a further assertion of its position in the dispute. Neither "party" to the highway contract could be the sole judge of whether the project was within the jurisdiction of the highway contract. Such an interpretation would be inconsistent with the efforts of the union and the contractors to establish comprehensive definitions of building work and highway work in the contracts.

In the case at bar, the union did not agree that the elevated drive was highway work. The basic issue was unchanged by the action of Phelps. This dispute was thus in fact still proceeding under the building contract. The union could not under such circumstances breach the highway contract by causing a work stoppage. The highway contract thus never came into existence, and the union cannot be required to exhaust its dispute procedure. *Cf.* United Steelworkers v. Warrior & Gulf Navigation Co.,

363 U.S. 574; United Mine Workers v. Ronceo, 314 F.2d 186 (10th Cir.).

The dispute procedure established in the building contract is rudimentary. Beyond the requirement of a meeting between the parties, the dispute provisions in the building contract provide for no further procedure for a binding resolution of the dispute, short of a strike, a lockout, or a law suit. While the dispute procedure does charge the parties to reach a settlement by "mediation, conciliation or arbitration as the circumstances require," no machinery is provided by which any of the foregoing alternatives might be implemented to achieve the "binding decision" envisioned by the dispute procedure. The parties do not assert that any procedure, beyond the meeting, was required by the language of the contract, and it appears that the language of the contract is inadequate to compel the parties to resort to additional extrajudicial procedures. *Cf.* United Steelworkers v. New Park Mining Co., 273 F.2d 352 (10th Cir.).

A failure to agree that disputes shall be resolved by binding arbitration permits the parties to resort to other remedies such as work stoppages, lockouts, or the courts. Compliance with the dispute procedure of the building contract was effected by the meeting of July 24, which resulted in a deadlock. The contract does not contain a "no strike" clause, and, as we have seen, it does not provide for binding and compulsory arbitration. Thus after the contractual dispute procedure proved ineffective to resolve the dispute, the parties were free to pursue their other remedies. The device selected by the union was a work stoppage. Phelps later has sought its remedy in the United States District Court. With different facts the forums selected could be reversed, Phelps imposing a lockout and the union bringing suit.

The union argues that the merits of the dispute concerning classification of the elevated drive were "matters which the parties left to mutual confidence and to their joint committees to work out, if possible, when problems should arise"; and therefore, the trial court erred by finding that the elevated drive was "highway construction within the meaning and intent" of the highway contract. We cannot accept this analysis of the trial court's limited role in adjudicating disputes arising under a collective bargaining contract. Federal policy, as revealed by § 301 of the Labor Management Relations Act, undoubtedly favors arbitration as the method for resolving disputes arising under collective bargaining contracts. United Steelworkers v. Warrior & Gulf Navigation Co., supra; Teamsters Union v. Lucas Flour Co., 369 U.S. 95. In the case at bar however the contract does not provide for binding arbitration, and resort to the court was proper.

The contracts in question reveal a joint effort of the union and the contractors to define and classify construction projects as building or highway work for purposes of determining the appropriate wage scale. Classification of a particular construction project is not beyond the scope of the contracts in question, nor is such classification beyond the contractual intent of the parties. The dispute here concerned interpretation and construction of the contracts, and the trial court properly adjudicated the dispute on its merits. When the dispute is one arising within the provisions of the contract, it is the function of the courts, under § 301, to adjudicate the dispute, absent provisions in the contract for binding arbitration. See Line Drivers Local No. 961 v. W. J. Digby, Inc., 341 F.2d 1016 (10th Cir.); United Steelworkers v. New Park Mining Co., 273 F.2d 352 (10th Cir.); *cf.* Atkinson v. Sinclair Refining Co., 370 U.S. 238; Smith v. Evening News Ass'n, 371 U.S.

195; Brown v. Sterling Aluminum Products Corp., 365 F.2d 651 (8th Cir.). See also Textile Workers v. Lincoln Mills, 353 U.S. 448.

Although the record reveals conflicting evidence relating to classification of the elevated drive, we are satisfied that there was substantial evidence to support the trial court's finding that the elevated drive was highway construction. Rule 52, Fed. R. Civ. Proc.; J. A. Tobin Construction Co. v. United States, 343 F.2d 422 (10th Cir.); State Farm Mutual Automobile Ins. Co. v. Lehman, 334 F.2d 437 (10th Cir.). The union caused Phelps to pay building wages for highway construction which was a breach of the building contract, and the union is liable to Phelps for damages.

The record discloses that Phelps claimed $9,327.00 in actual damages. The trial court awarded judgment for $8,000.00, finding that Phelps had paid to carpenters working on the elevated drive "not less than $8,000.00 in excess of that which the plaintiff [Phelps] would have been obligated to pay" if the highway contract had been applicable. We are satisfied that there was substantial evidence upon which the trial court could find that a sum not less than $8,000.00 would compensate Phelps for excessive wages paid, and we cannot say that such finding is clearly erroneous.

The judgment is AFFIRMED.

ON PETITION FOR REHEARING

(Filed June 7, 1967)

The appellants' petition for rehearing is denied. Our opinion is modified as follows: The judgment of the District Court is affirmed with respect to appellant, United Brotherhood of Carpenters & Joiners of America, Carpenters District Council of Denver and Vicinity, and the judgment of the District Court is reversed with respect to appellant, United Brotherhood of Carpenters & Joiners of America, AFL-CIO, Colorado State Council of Carpenters Its Affiliated District Councils and Affiliated Local Unions. The District Court's amended judgment dismissed the action against the individual defendants, Leslie Prickett, Adolph LaValle, and James McFarland. These individuals were erroneously listed as appellants in this court.

APPENDIX B

[Caption Omitted]

TWELFTH DAY, MAY TERM, WEDNESDAY,

JUNE 7th, 1967.

Before Honorable Jean S. Breitenstein and Honorable Oliver Seth, Circuit Judges, and Honorable Ewing T. Kerr, District Judge.

ORDER ON PETITION FOR REHEARING

The appellants' petition for rehearing is denied. Our opinion is modified as follows: The judgment of the District Court is affirmed with respect to appellant, United Brotherhood of Carpenters & Joiners of America, Carpenters District Council of Denver and Vicinity, and the judgment of the District Court is reversed with respect to appellant, United Brotherhood of Carpenters & Joiners of America, AFL-CIO, Colorado State Council of Carpenters its Affiliated District Councils and Affiliated Local Unions. The District Court's amended judgment dismissed the action against the individual defendants, Leslie Prickett, Adolph LaValle, and James McFarland. These individuals were erroneously listed as appellants in this court.

[SEAL]

A true copy.

Teste

WILLIAM L. WHITTAKER
Clerk, U.S. Court of Appeals,
Tenth Circuit

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, CARPENTERS DISTRICT COUNCIL OF DENVER AND VICINITY, AFL-CIO, PETITIONER,

v.

HENSEL PHELPS CONSTRUCTION COMPANY, RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Respondent above named prays that a writ of certiorari not issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

REASONS FOR DENYING THE WRIT OF CERTIORARI

Petitioner would have this Court believe that the Court of Appeals has erroneously decided an important federal question by somehow unlawfully impeding the right of employees to strike. It is here contended that such an interpretation by the Petitioner constitutes a gross misinterpretation of the decision of the Court of Appeals. The Court of Appeals decided this matter solely as a contract question, pure and simple.

Although both sides presented arguments below regarding the applicability of a no strike clause, the Court of Appeals specifically accorded the Union the right to engage in a strike or work stoppage, the exercise of which, under the circumstances, would not give rise to damages. The decision of the Court of Appeals, in fact, states at page 15:

> "The contract does not contain a 'no strike' clause and, as we have seen, it does not provide for binding and compulsory arbitration. Thus after the contractual dispute procedure proved ineffective to resolve the dispute, the parties were free to pursue their other remedies. The device selected by the Union was a work stoppage." (Emphasis supplied)

Thus, the Court of Appeals specifically accorded to the Union the right to engage in a strike or work stoppage. The basis

for the decision in Respondent's favor and the awarding of damages was not because of the work stoppage, but because the Union caused Respondent to pay a higher wage rate in violation of the executed building contract, and hence the Petitioner was liable as a matter of basic contract law for damages. The decision of the Court of Appeals does not, as Petitioner would interpret it, say that the Union had a right to strike, but may be held in damages for exercising its right (Petitioner's Brief, Page 7). Thus, the whole of Petitioner's argument, which involves the protection of the Union's sacred right to strike, must of necessity have no applicability to the decision of the Court of Appeals.

It seems readily apparent, from reading the decision of the Court of Appeals, that said Court awarded damages to the Respondent, not because of the work stoppage, but because the Union caused Respondent to pay the higher wage rate, by its insistence upon erroneously interpreting the building agreement. In this regard, note the language of the Circuit Court at page 11 of its decision:

> "As indicated above, the disagreement between the parties centered about <u>one issue</u>. Was the elevated drive building work, or was it highway work? .... The dispute here is fundamental, for it questions which of the two contracts should

apply to the elevated drive. Until the underlying question of fact was determined, that is, classification of the elevated drive as building or highway work, the parties could not know which wage scale to use." (Emphasis supplied)

It is quite obvious that the issue before the Court of Appeals and the decision rendered by it were in no manner related to the fact that the Union struck to enforce its interpretation of the building agreement. Such is to say that damages were not awarded to the Union because it struck and caused a work stoppage, but because of the Union's insistence upon interpreting the building agreement incorrectly so that the higher rate of pay applied. If the Court had held that the breach of the agreement for which damages were allowed was caused by the Union's action in striking and causing a work stoppage, then the question of which rate of pay applied would have been irrelevant. The Union would be liable in damages because of the work stoppage. Had the Circuit Court found that damages were owed to Respondent because of the strike, what would those damages have been? The damages because of the strike and the work stoppage are normally damages such as any penalty the Respondent would have paid because of a delay, extra costs which it incurred in maintaining the project during the strike, lost profits, etc. However, no such damages were granted by

either the District Court or the Court of Appeals. Instead, both the District Court and the Circuit Court limited the measure of damages solely to the difference between the rate of pay in the highway contract as compared with the rate of pay in the building contract (Ct. of App. Decision, Page 17-18). Certainly, the actual damages granted were not as a result of any strike. They were simply a result of the judicial determination as to which contractual rate applied.

Thus, the Court of Appeals merely affirmed the finding of the United States District Court which found on the evidence that the work was highway construction work. Under Rule 52 Fed. R. Civ. Proc. and numerous case decisions, this finding should not be overturned. The Union received a windfall based on its breach of contract and it must make Phelps whole for its unjust enrichment.

Had the Court decided that the higher rate of pay was contractually proper, no damages would have been granted to the Respondent. As a consequence, the Court of Appeals' determination was simply and totally a matter of contractual interpretation, and in no wise resulting in any determination dealing with possible damages which may have occurred as the result of a strike and a work stoppage. Certainly in this decision there is no substantial federal question or any matter of substan-

tial public policy or interest which would make this an appropriate case for granting of a writ of certiorari.

CONCLUSION

It is, therefore, respectfully submitted that for the foregoing reasons the petition for a writ of certiorari should be denied.

RESPECTFULLY SUBMITTED:

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